

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petition	:	
of	:	
FRANCIS J. CRISPO	:	DETERMINATION
	:	DTA NO. 811362
for Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1989	:	
through November 30, 1990.	:	

---

Petitioner, Francis J. Crispo, 175 West 92nd Street, New York, New York 10025, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1989 through November 30, 1990.

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on October 7, 1993 at 1:15 P.M. Briefs were filed by petitioner on November 19, 1993 and December 20, 1993 and by the Division of Taxation on December 9, 1993. Petitioner was represented by Jackson and Nash (Joseph Michaels IV, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel).

ISSUE

Whether petitioner's request for a conciliation conference was timely, and, if not, whether he has a right to a conciliation conference based upon a timely request made by another taxpayer with whom he has common interests.

FINDINGS OF FACT

Petitioner, Francis J. Crispo, was an officer of 1991 Broadway Restaurant Corp., as well as the chief chef of the restaurant it operated until he resigned in July 1990. A Mr. Terrance Singleton was also an officer.

The Division of Taxation ("Division") issued four notices of determination and demands for payment of sales and use taxes due to petitioner on August 27, 1991 for the four quarters

ended February 28, 1990 through November 30, 1990, stating that petitioner was liable as an officer of 1991 Broadway Restaurant Corporation for sales and use taxes in the aggregate amount (for all four determinations) of \$100,457.48, penalty of \$25,454.25 and interest of \$13,787.86, for a total amount due of \$139,699.59.

(a) Mr. Crispo believes that in late 1991 his attorney at the time properly and timely filed a request for a conciliation conference. However, on May 19, 1992, Mr. Crispo called the tax examiner who had issued the notices, Mr. Ryan, and was told that as far as the examiner knew no request for a conference had been made.

(b) On May 22, 1992, Mr. Crispo, now represented by Mr. Michaels of Jackson and Nash, requested a conference. On August 7, 1992, a conciliation conferee issued an order denying Mr. Crispo's request as untimely made.

(c) A petition for a hearing with the Division of Tax Appeals was filed on November 9, 1992.

(a) On August 31, 1991, the Division issued four notices of determination, nearly identical to the notices sent to petitioner, to Terrance Singleton, who had been for a time the secretary and a director of 1991 Broadway Restaurant Corporation.

(b) Mr. Singleton, by his attorney, Mr. Michaels of Jackson and Nash, requested a conciliation conference by a request dated November 18, 1991.

(c) In a statement attached to his request for conference, Mr. Singleton named Mr. Lewis Futterman as president and chief executive officer of the corporation, owner of 65% of the stock and also owner of the building leased to the corporation. Mr. Crispo was named as "chief chef", a minority shareholder and formerly a director and vice-president. Amy Yue, a bookkeeper, was said to have filed all tax returns and a Mr. Lewin was identified as the certified public accountant. Mr. Singleton identified himself as Mr. Futterman's "surrogate" with limited check-writing and signing authority. Mr. Singleton clearly points to Mr. Futterman as being responsible for sales taxes.

(d) The determinations against Mr. Singleton were cancelled on May 15, 1992.

(e) Mr. Crispo and Mr. Singleton have common interests in the transactions involved in this case. They had the same attorney during the months immediately after the issuance of the August 1990 notices of determination. Mr. Crispo's petition includes a copy of a letter from Mr. Singleton, dated August 23, 1990, referencing "Francis J. Crispo/1991 Broadway Restaurant Corp.", to his then attorney stating that "Frank" and he had resigned as officers and directors but were keeping their stock. He stated "[a]s per instructions from Frank" he was enclosing materials necessary to have his and Frank's name removed from the liquor license.

#### CONCLUSIONS OF LAW

A.(1) A request for a conciliation conference must be made within the time permitted for a petition for a hearing before the Division of Tax Appeals (Tax Law § 170[3-a][a]). That time is 90 days after the giving of a notice of determination of sales tax due (Tax Law § 1138[a][1]). It is agreed by the parties that the alleged request made directly by Mr. Crispo dated May 22, 1992 was not timely filed. This is no longer an issue and need not be addressed.<sup>1</sup> However, Mr. Crispo's associate, Mr. Singleton, had filed a timely request for a conference, as a result of which, the determination against him was cancelled. That request had named the other persons involved in the business including Mr. Crispo, who was named as the chief chef of the restaurant. Petitioner asserts that Mr. Singleton's timely request validated his own late filed request for conference citing the Tax Appeals Tribunal decision in Matter of Miles (Tax Appeals Tribunal, September 13, 1990). The Division, in its brief, contests this on the ground that Mr. Crispo's name was not included on the request. However, as I have found Mr. Crispo's name to be included in a statement describing the corporate structure attached to the request, I find the objection of the Division to be merely formal and hypertechnical and I reject it.

(2) I wish to add, in addition to dealing with the issues raised by the parties, the

---

<sup>1</sup>The conclusions of an Administrative Law Judge must, as instructed by the Tax Appeals Tribunal, "address every issue raised by the parties . . . so long as the issue has not been subsequently abandoned by the parties" (Matter of United States Life Ins. Co., Tax Appeals Tribunal, March 24, 1994). I take this to mean that I must address those issues which the parties have explicitly identified and addressed.

following comments. The Tribunal, in the Miles case cited above, has allowed an otherwise deficient document to qualify as an "informal" claim for refund of income tax. The Tribunal quoted from a U.S. Supreme Court case as follows:

"[a] notice fairly advising the Commissioner of the nature of the taxpayer's claim, which the Commissioner could reject because too general or because it does not comply with formal requirements of the statute and regulations, will nevertheless be treated as a

claim where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory [sic] period' (United States v. Kales, [314 US 186], 41-2 USTC ¶ 9785, at 1,041)."

Indeed, the Miles case allowed as a valid claim for one year a document claiming the refund for a subsequent year despite the prohibition of Tax Law § 689(g). The Tribunal's result is supported by the important policy of the Division to provide the public with "a just system of resolving controversies" (Tax Law § 2000). In view of the Miles case, I can see no impediment now to applying the doctrine of that case to the case herein. That doctrine should be especially important when a person is being held liable as in this case for taxes most properly payable by his employer. Presumably, the alleged errors in tax administration in both the Miles case and in this one are rare enough. Although one Federal case has held that one taxpayer cannot rely on the claim of another, that same case also decided that a taxpayer cannot rely on his own informal claim for a different year (Rosengarten v. U.S., 149 Ct Cl 287, 181 F Supp 275, 60-1 US Tax Cas [CCH] ¶ 9303, cert denied 364 US 822), a proposition rejected by the Tribunal in the Miles case. In this case, one taxpayer's request certainly gives the Division's auditor a view of an entire course of conduct so as to call into question the liability of everyone -- including another taxpayer, petitioner herein. This is not a case where the taxpayer filed a waiver of restrictions on an assessment (see, Barenfeld v. U.S., 442 F2d 371, 194 Ct Cl 903, 71-1 US Tax Cas [CCH] ¶ 9401). It is also not a case where a petition need be filed with an independent court or tribunal. These arguments in favor of the taxpayer are persuasive under the income tax under which the above cases were decided. They appear to me to be even more persuasive under the sales tax in view of the extremely restricted right of a taxpayer to obtain a refund after payment of the tax (see, Tax Law § 1139[c]).

B. The request for a conciliation conference was timely. The matter is remanded to the Bureau of Conciliation and Mediation Services.

DATED: Troy, New York  
June 9, 1994

/s/ Nigel G. Wright  
ADMINISTRATIVE LAW JUDGE